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<b>PRE-APPEAL BRIEF REQUEST FOR REVIEW</b>		Docket Number (Optional)  <b>PAT 2678-2</b>	
I hereby certify that this correspondence is being deposited with the United States Postal Service with sufficient postage as first class mail in an envelope addressed to "Mail Stop AF, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450" [37 CFR 1.8(a)]  on _____  Signature _____  Typed or printed name _____		Application Number  <b>09/995,697</b>	Filed  <b>November 29, 2001</b>
First Named Inventor  <b>Gordon KERR et al.</b>		Examiner  <b>EL CHANTI, Hussein A</b>	
Art Unit  <b>2157</b>		Examiner  <b>EL CHANTI, Hussein A</b>	

Applicant requests review of the final rejection in the above-identified application. No amendments are being filed with this request.

This request is being filed with a notice of appeal.

The review is requested for the reason(s) stated on the attached sheet(s).  
Note: No more than five (5) pages may be provided.

I am the

☐ applicant/inventor.

☐ assignee of record of the entire interest.  
See 37 CFR 3.71. Statement under 37 CFR 3.73(b) is enclosed.  
(Form PTO/SB/96)

☒ attorney or agent of record. **45,291**

Registration number \_\_\_\_\_

☐ attorney or agent acting under 37 CFR 1.34.

Registration number if acting under 37 CFR 1.34 \_\_\_\_\_

\_\_\_\_\_  
Signature

**Anne Kinsman**  
Typed or printed name

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Telephone number

**June 23, 2006**  
Date

NOTE: Signatures of all the inventors or assignees of record of the entire interest or their representative(s) are required. Submit multiple forms if more than one signature is required, see below\*.

☒ \*Total of 1 forms are submitted.

This collection of information is required by 35 U.S.C. 132. The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.11, 1.14 and 41.6. This collection is estimated to take 12 minutes to complete, including gathering, preparing, and submitting the completed application form to the USPTO. Time will vary depending upon the individual case. Any comments on the amount of time you require to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P.O. Box 1450, Alexandria, VA 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. SEND TO: Mail Stop AF, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.

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JUN 23 2006

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

In re Application of: KERR, Gordon; PILLAR, John, F.; LENGACHER, Allen, W.  
Serial No.: 09/995,697  
Filed: November 29, 2001  
Title: STREAM PROCESSING NODE  
Group: 2157  
Examiner: EL CHANTI, Hussein A  
Attorney Ref.: PAT 2678-2 US

June 23, 2006

Commissioner for Patents  
P.O. Box 1450  
Alexandria, VA 22313-1450  
Mail Stop AF

**PRE-APPEAL BRIEF REQUEST FOR REVIEW**

We submit that this case is appropriate for the pre-appeal process, because the Final Action, and the previous action on which it is based, contain clear errors as the rejections are improper and without basis.

**1. STATUS OF THE CLAIMS**

Claims 1-30 and 32-39 are rejected under 35 U.S.C. 102(e) as being anticipated by Vahalia et al., U.S. Patent No. 5,933,603 (referred to hereafter as Vahalia).

**2. SUMMARY OF CLAIMED SUBJECT MATTER**

For ease of reference, claim 1 is repeated:

1. An apparatus for processing data streams comprising:  
at least one producer of properly ordered substreams of a data stream;  
a plurality of potential consumers of a data stream; and  
a stream fabric, coupled to the producer and the potential consumers, that operates to receive the substreams from the producer, store each substream within a stream queue associated with each data stream and select one of said plurality of potential consumers and output at least a portion of the data within the stream queue to the selected consumer. (emphasis added).

Application serial no. 09/995,697  
Pre-Appeal Brief Request for Review dated June 23, 2006

### 3. GROUNDS OF REJECTION TO BE REVIEWED

Appellants contend that none of the claims are anticipated (or even suggested) by Vahalia.

Clear errors suitable for a pre-appeal review include:

- A) the rejection of claim 1 as anticipated is improper as at least one claim element is not present in the applied art and the Examiner's inherency analysis constitutes a clear error; and
- B) the remaining rejections are similarly improper as they fail to provide sufficient reasons for rejecting claims 2-39 and are therefore improper and without basis.

### 4. ARGUMENT

#### A. At least one claim element is not present in applied art nor overcome by the Examiner's inherency analysis

Claim 1, amongst other things, includes the limitation of a stream fabric. In support of rejecting the Claim on the basis of anticipation the Examiner reiterated the Claim language and noted as follows: "(see col. 23 lines 55 - col. 24 lines 62, clients request a stream to be routed, in response the controller selects a stream server to satisfy the client request)".

While Vahalia may teach a mechanism for serving video streams to clients, wherein clients request a stream to be routed, and in response the controller servers (28 or 29) selects a stream server (21) to satisfy the client request, a point which the Appellants do not concede, Vahalia does not does not teach a stream fabric when that limitation is construed through they eyes of a person of ordinary skill in the art in light of the specification as a whole (*Phillips v. AWH Corp.*, 363 F.3d 1207 (Fed. Cir. 2004) (*en banc*)).

According to an embodiment of the invention the specification of the present application describes a content switching node that "includes a stream fabric capable of switching on a stream basis. As can be seen in Figure 2 of the present application, the stream fabric 70 includes a stream queue controller 72 and a plurality of stream queues 74 that store subsets of data streams while they await processing or transmitting" (see e.g. p. 9, lines 25-28)

Neither the cited passages, nor Vahalia in general teach any type of fabric. Rather, according to the detailed description of Vahalia, "Each of the stream servers 21 is a high-end commodity computer (see col. 5, lines 29-30)" Vahalia further notes that the control servers 28 and 29 are dual-redundant computers similar to stream servers 21 (see col. 5, lines 58-60).

Application serial no. 09/995,697  
Pre-Appeal Brief Request for Review dated June 23, 2006

Most recently, in response to the Applicants' arguments concerning the stream fabric, the Examiner overcame the lack of description in Vahalia regarding a stream fabric by noting that the applied reference teaches a controller server, which "inherently has a switch fabric and therefore ... meets the scope of this claimed limitation" (see Final Action, dated Feb. 23, 2006, p. 11, bottom para.).

To establish inherency, the extrinsic evidence "must make clear that the missing descriptive matter is necessarily present in the thing described in the reference, and that it would be so recognized by persons of ordinary skill." In re Robertson, 169 F.3d 743, 745, 49 USPQ2d 1949, 1950-51 (Fed. Cir. 1999). "In relying upon the theory of inherency, the examiner must provide a basis in fact and/or technical reasoning to reasonably support the determination that the allegedly inherent characteristic necessarily flows from the teachings of the applied prior art." Ex parte Levy, 17 USPQ2d 1461, 1464 (Bd. Pat. App. & Inter. 1990) (emphasis in original).

The Final Action and most recent Advisory Action do not provide any basis in fact and/or technical reasoning to reasonably support the determination that a controller server necessarily includes a switch fabric. Seemingly at odds with the description of Vahalia the Examiner notes that "The control servers 28 and 29 are servers and not PCs and therefore the control servers inherently have a stream fabric."

As demonstrated in the argument and evidence supplied in our After-Final, response dated April 28, 2005, at pp. 4-5, commodity computers use a bus architecture do not inherently include a switch fabric.

**B) The remaining rejections are similarly improper**

Claims 2-39 include the stream fabric limitation of claim 1 and are therefore improperly rejected for the same reasons set out above. The remaining rejections to the claims are similarly improper as they fail to provide sufficient reasons for rejecting claims 2-39 and are therefore improper and without basis.

**5. CONCLUSION:**

For the above-provided reasons, the Appellants respectfully request that the foregoing rejections be overturned and the claims in the present application be allowed to issue.

Favourable consideration is respectfully requested.

A Petition for a One-Month Extension of Time is enclosed under separate cover.

The Commissioner is hereby authorized to debit any required fee from Deposit Account No. 501593, in the name of Borden Ladner Gervais LLP. The Commissioner is further authorized to debit any additional amount required, and to credit any overpayment to the above-noted deposit account.

Application serial no. 09/995,697  
Pro-Appeal Brief Request for Review dated June 23, 2006

Respectfully submitted,

**KERR, Gordon ET AL.**

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**JMM/ALK/dbm**